Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04516/2018

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 11th December 2018	**On 13th December 2018**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MARIUS DANIEL PRODANESE
(ANONYMITY NOT DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Trevelyan, Counsel instructed on behalf of the Appellant

For the Respondent: Mr McVeety, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, with permission, appeals against the decision of the First-tier Tribunal (Judge Housego), who in a determination promulgated on the 17th August 2018 dismissed his appeal against the decision of the Secretary of State to remove the Appellant under the Immigration (EEA) Regulations 2016, having been served with a form IS151A (EEA) informing him of his status under the regulations and of his liability to removal. The decision had been taken to remove him in accordance with section 10 of the Immigration and Asylum Act 1999 (which applied by virtue of regulations 23 (6) (a) /23(6) (c) pursuant to regulation 26(3) and 32 (2) of the EEA Regulations. The date of the immigration decision was 19 June 2018.

2. Prior to that there was a letter of 7 June 2018 setting out why the decision had been taken to remove him from the United Kingdom which set out that the Appellant had not demonstrated a right to reside under regulation 6 of the Regulations as either a job seeker, worker, self-employed, self-sufficient or having comprehensive medical insurance.

3. The Appellant is a citizen of Romania born on 9 September 1992 who arrived in the UK on 1 March 2014. During the period of his residence it is asserted that he undertook forms of employment.

4. On 3 May 2018 he was convicted of three counts of shoplifting and was sentenced to 12 weeks imprisonment.

5. On 21 May 2018 the Appellant was served with a “minded to remove” letter and filled in a questionnaire as to his employment and resources.

6. He completed his prison sentence on 13 June 2018 and was then detained under the immigration powers.

7. Prior to that there was a letter of 7 June 2018 setting out why the decision had been taken to remove him from the United Kingdom which set out that the Appellant had not demonstrated a right to reside under regulation six of the regulations is either a job seeker, worker, self-employed, self-sufficient or stewed comprehensive medical insurance.

8. The Appellant exercised his right to appeal that decision and appeal grounds were filed on 26 June 2018. He was served with removal directions on 27 June 2018. The appeal was allowed out of time on 2 July 2018.

9. In those appeal grounds he set out that he was waiting for appointment to see the duty solicitor for advice.

10. He made an application for bail which was refused on 3 July 2018 and on the same day his appeal hearing date was set for 24 July 2018.

11. He was seen by solicitors at a legal advice surgery on 5 July 2018 and the applicant’s solicitors applied for an adjournment because exceptional case funding was required. This was refused on 10 July 2018. However a second

letter was sent by his solicitors on 12 July 2018 requesting an adjournment. The adjournment was in fact granted on 13 July 2018; the Appellant was released on bail on 20 July 2018 and a new hearing date was set for 7 August 2018. On 6 August 2018 a third request for an adjournment was made requesting a hearing date after the 2 September 2018 as the legal aid agency said they would take another 10 working days to deal with the application. It does not appear that that application was dealt with because on the hearing date on 7 August 2018 the judge proceeded with the appeal in the absence of the Appellant or any legal representatives.

12. In the determination promulgated on 17th of August 2018 he set out his reasons as to why he was proceeding in the Appellant's absence. He noted that the appeal had been listed on 7 August 2018, five days after the date requested by the solicitor in the second application of the adjournment. He noted that the Appellant was absent and that a reason for refusing bail was that he was at risk of absconding. It was noted that he has been reported as having resources to buy an ticket and therefore was not precluded by poverty from attending the hearing. The judge considered that the Appellant knew of the hearing because his solicitor had applied for an adjournment and as the issue was whether or not the Appellant was exercising treaty rights which could be proved by paperwork the Appellant provided none other than one document, the judge reached the overall conclusion that he had voluntarily absented himself from the hearing.

13. The judge then considered the appeal on the basis of the material before him and reach the overall conclusion that he was not exercising treaty rights.

14. Shortly after the hearing the Appellant did in fact obtain legal representation as it been indicated in the earlier letters when seeking an adjournment. There then followed grounds of appeal based on a procedural irregularity namely the failure to adjourn and proceed in the absence of the Appellant. Permission was granted by Judge Osborne on 25 October 2018.

15. At the hearing before the Upper Tribunal the Appellant was represented by Mr Trevelyan of Counsel and he had helpfully provided a skeleton argument setting out his submissions. The issue raised in the appeal was whether the refusal to accede to the request for an adjournment of the hearing listed on 7 August 2018 was a material error of law.

16. It is submitted that the judge failed to apply the procedure rules all the principles in the decision of Nwaige either expressly or impliedly when reaching his decision at paragraph 3 to proceed in the absence of the Appellant.

17. It is also asserted that the judge failed to take into account relevant matters; that he would be deprived of his right to fair hearing, he previously been granted an adjournment for identical reasons and the

delay in securing funding was due to the LAA requiring additional time and was not the fault of the Appellant or his representatives and the failure to file and serve documents in support of his claim was inexplicable because the basis for the request to adjourn was because he had no legal assistance and that there was no relative prejudice the parties in proceeding or adjourning. It was submitted that in this case was no suggestion of representatives unreasonably delaying the matter or acting improperly and the previous adjournment requested confirmed that in the solicitor's assessment the Appellant did not understand legal issues or how to prepare the relevant evidence and it is not his first language.

18. At paragraph 6 of the skeleton argument he sets out other factors that the judge took into account which were immaterial to the decision. Mr Trevelyan therefore submitted that the judge did not consider whether to adjourn the proceedings would be fair. He invited me to find a material error of law and a paragraph 9 of his skeleton argument submitted the matter should be remitted to the first-tier Tribunal in accordance with the practice statement.

19. Mr McVeety, senior presenting officer confirmed that there was no Rule 24 response. The only point he relied upon was that this did not appear to be a case of any complexity and that the only issue related to the Appellant exercising treaty rights. However Mr Trevelyan by way of response that submitted that the reason for the adjournment had been made clear in the correspondence that in fact he needed advice as to what he should provide and that the solicitors could not give that advice until they had received the appropriate funding.

20. Having had the opportunity of considering the respective submissions I am satisfied that the judge erred in law as set out in the grounds. When reaching a decision to proceed in the absence of the Appellant, the judge did not apply other relevant parts of the relevant Procedure Rules.

21. The 2014 Procedure Rules Rule 4(3) (h) empowers the Tribunal to adjourn a hearing. Rule 2 sets out the overriding objectives under the Rules which the Tribunal "must seek to give effect to" when exercising any power under the Rules. It follows that they are the issues to be considered on an adjournment application as well. The overriding objective is deal with cases fairly and justly. This is defined as including "(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as is practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of the Tribunal effectively; (e) avoiding delay so far as compatible with proper consideration of the issues".

22. In Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) it was held that If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these

include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing?

23. The judge did not expressly or impliedly consider whether an adjournment should be granted in accordance with the rule I have set out above or in accordance with the case law.

24. Even if it could be said that at paragraph 3 by considering the rules that relate to proceeding in the absence of Appellant that what the judge effectively was doing was considering whether adjournment should be granted, I am satisfied that submissions made by Mr Trevelyan are correct in that the judge did not take into account all of the relevant and material considerations; some of them are set out in the decision of Nwaige and others come from the procedural background. In particular, there was no consideration of a right to a fair hearing but I think more importantly the reason for the adjournment was to secure funding due to the LAA requiring additional time and as an adjournment had been granted previously for an identical reason that would indicate that the further application had merit. There was no indication either in the decision that the failure to secure funding and the delay in such was down to the Appellant or his representatives. It was a relevant consideration to address the issues that were raised in the appeal as the judge did state, namely whether the Appellant was or was not exercising treaty rights. However that has to be seen in the context of the Appellant’s application for an adjournment which was based on seeking legal representation and that any failure to file and serve documents was because he was awaiting that legal advice. This was not a case as Mr Trevelyan submits of the representatives delaying the matter and the previous adjournment request which had been granted confirmed that the assessment made by the legal representatives at that time was that the Appellant did not and understand legal issues or how to prepare the evidence.

25. I have therefore reached the conclusion that I am satisfied that there was a procedural unfairness, for the reasons set out above.

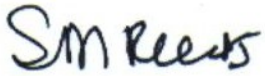
26. As to the remaking of the decision, the Appellant was not present at court. Mr Trevelyan had set out in his skeleton argument and in his oral submissions that he was instructed that the Appellant was awaiting further documentation from the HMRC regarding his employment history and in the circumstances the correct course to adopt would be for the appeal to be remitted to the First-tier Tribunal because it would enable the judge to consider the Appellant’s status in the light of his oral evidence and the documents he would wish to provide; some were said to be awaited. Mr

McVeety confirmed that there was some questions surrounding the documentation and that if there were to be further documents provided that the remittal of the application was therefore the correct course.

27. In the light of those submissions, and as both advocates agree that that is the correct course to take, I set aside the decision of the First-tier Tribunal and it will be remitted to the First-tier Tribunal to hear afresh.

Decision:

The decision of the First-tier Tribunal involved the making of an error on a point of law and is hereby set aside; it shall be remitted to the First-tier Tribunal for a further hearing.



Signed Date: 11/12/2018
Upper Tribunal Judge Reeds